Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-554

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

VERSUS

ALBERT WILLIAM ZIMMER, TRUSTEE OF
THE ESTATE OF WILLIAM H. BROWN, DECEASED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, NATURAL GAS PIPELINE COMPANY OF AMERICA, prays that a Writ of Certiorari issue to review the opinion and Judgment of the United States Court of Appeals for the Fifth Circuit rendered in this proceeding on July 5, 1978.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, reported at 477 F. Supp. (1977), appears at Appendix A, *infra*, pp. A-1 - A-17. The opinion of the

United States Court of Appeals for the Fifth Circuit, 576 F.2d 106 (1978) appears at Appendix B, *infra*, pp. A-18 - A-20. The Court of Appeals affirmed the Judgment of the District Court, for the reasons set forth in the Memorandum Opinion of the District Court, cited above. On August 24, 1978, the Court of Appeals denied a petition for rehearing.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered and entered on July 5, 1978. This Petition for Writ of Certiorari is filed less than ninety days from such date. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Petitioner, NATURAL GAS PIPELINE COMPANY OF AMERICA brought suit to determine whether, under Texas law, an oil and gas lease in which it was lessee had terminated. The sole question arising under this suit is:

Did the United States Court of Appeals for the Fifth Circuit, by affirming the Judgment of the District Court, for the reasons set forth in the Memorandum Opinion of the District Court, decide the question presented in conflict with applicable state law?

Petitioner represents to this Court that the decision of the question presented will affect not only the parties to this suit, but also other persons who are parties to oil and gas leases containing the same language or language with the same import as that contained in the oil and gas lease which is the subject of this suit.

STATEMENT OF FACTS

The facts which raise the question presented are uncontroverted, and may be presented to the Court in summary fashion.

Petitioner is the successor in interest to the lessee under an oil and gas lease covering 1,280 acres of land in the Texas Panhandle, dated January 16, 1926. ***See*** Appendix C, pp. A-21 - A-33, ***infra***. Respondent is the successor in interest of the lessor under such lease, which provided that the term of the lease expire at the end of fifty years. On April 5, 1935, the parties executed an agreement which referred to the January 16, 1926 lease, and contained the following language:

> One well shall constitute adequate development of said 1280 acres, insofar as the production of natural gas only is concerned, and said oil and gas lease shall remain in full force and effect as to all the land included within said 1280 acres, so long as oil or gas is produced from any portion thereof. ***See*** Appendix C, p. A-36, ***infra***.

If the oil and gas lease expired on January 16, 1976, then, from that date forward, Respondent is the owner of the oil, gas and other minerals covered by the lease. If the lease did not expire at the end of fifty years, then Petitioner is the owner of 7/8 of such minerals in and under such lands, and Respondent is the owner of 1/8 thereof.

Before the District Court, without a jury, and upon stipulated facts, Petitioner argued that the language quoted above from the 1935 agreement had the effect of amending the habendum or granting clause of the oil and gas lease, and that the lease continues in full force and effect and will continue in full force and effect so long as oil or gas is produced from the lands covered by the lease. Respondent argued that the 1935

agreement was no such amendment and that the lease had expired after fifty years.

The District Court held that the habendum clause was not amended and that the lease expired with the passing of fifty years after its making. Third-party Defendant GULF OIL CORPORATION did not perfect its appeal and is not a party in this proceeding for Writ of Certiorari.

The United States Court of Appeals, in a *per curiam* opinion, affirmed the Judgment of the District Court, adopting its reasons for decision.

REASON FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Fifth Circuit has decided an important state question in a way in conflict with applicable law of the State of Texas.

The District Court, and the Court of Appeals by adopting the reasoning of the District Court, have decided the question presented below by trying to apply the reasoning in *Gulf Oil Corporation v. Southland Royalty Company*, 496 S.W.2d 547 (Tex. 1973). That was a suit for declaratory judgment to determine the longevity of an oil and gas lease, which the Supreme Court of Texas noted was "almost entirely a printed document." 496 S.W.2d at 548. The controversy in that case centered upon the habendum or granting clause and a provision which the party seeking termination of the lease referred to as a force majeure or excuse clause. Gulf, the party seeking a continuation of the lease, urged to the court in that case that the last-mentioned provision had an overriding effect which extended the fifty-year term contained in the habendum clause to include certain periods of time during which it had been denied the production of substantial amounts of oil because of reasons beyond its control.

In holding against Gulf, the Supreme Court stated that the duration of the estate granted in an oil and gas lease is traditionally determined by the habendum clause and that the estate granted therein cannot be changed with words elsewhere in the lease not certainly directed to the same question.

The courts below in the instant case did not have before them facts which call for an application of the rule announced in *Gulf v. Southland.* The rules called for in the instant case are those which apply to the making and amending of contracts. The court in *Gulf* had before it a single instrument. In the instant case, the courts below had before them two documents, the first an oil and gas lease, and the second, recited to be an "agreement" which, as admitted by all parties to this suit, was ambiguous and had the effect of amending the oil and gas lease in one or more respects. The law in Texas concerning the legal effect of a contract amendment is that the new agreement takes the place of the original and consists of the new terms agreed upon by the parties and such provisions of the original as the parties agree are to remain unchanged. ***Maddox Motor Co. v. Ford Motor Co.***, 23 S.W.2d 333 (Tex. Comm'n App. 1930, holding approved). Although not a lengthy document, containing only three pages, the second document contained all the provisions necessary to constitute a separate oil and gas lease and, recited that the provisions of the original lease were to remain in full force and effect, except as modified by the second document.

The rule in ***Maddox, supra,*** is the law applicable to the facts in this case. The holdings of the courts below cannot be squared with Texas law respecting the modification and amendment of contracts. The courts below have applied rules applicable to the construction of a single instrument where the object is to reconcile, if possible, all the language in that single instrument. Here, the courts considered a subsequent instrument which, by consent of the parties thereto, had as its purpose the

amendment of a prior instrument, in one or more respects, and, thus, necessarily was irreconcilable with one or more provisions of the prior instrument.

To apply the rule in *Gulf v. Southland, supra,* to the facts in the instant case, merely because both cases involve an oil and gas lease which contained a fifty-year term, and in which the lessee sought an extension of that term, is to set aside rules of state law which make predictable the consequences of the acts of these parties and all other parties to oil and gas leasing transactions, and results in a different decision in federal court as against the decision which would have been reached in a Texas state court. Federal courts are to apply state substantive law. *Hanna v. Plumer,* 380 U.S. 460 (1965); *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

In deciding this case in a way which conflicts with applicable state law, the courts below have created uncertainty in a law respecting contracts, and the need therefore arises for the dispelling of this uncertainty by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to allow a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Raymond W. Richards per mail s.s.

Raymond W. Richards

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Howard F. Saunders III

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P. O. Box 189
Amarillo, Texas 79105

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for a Writ of Certiorari has been served upon all interested parties herein by placing same in the United States Mail, certified, return receipt requested, this 29th day of September, 1978, addressed as follows:

Mr. Tabor Scott
100 E. 5th Street
Amarillo, Texas 79101

Mr. Harold W. Ochsner
705 Plaza One
Amarillo, Texas 79101

Raymond W. Richards per m.a.s.
Of Counsel

ria he considers most important are the past record of the parolee and the number and seriousness of the alleged violations. The Court can hardly state that such criteria are irrational. [2]

[3] Mr. Nardoza stated that in petitioner's case, his decision to proceed by warrant was influenced by petitioner's past record and the frequency of alleged meetings with persons with known criminal records. [3] He stated that because petitioner's original conviction was for conspiracy with twenty-eight other persons to violate the narcotics laws, he found that the frequency of Galante's alleged meetings with known criminals was "strongly suggestive of a course of conduct that could pose a threat to society." Based on these considerations, the Court can certainly not state that the decision to proceed by warrant was arbitrary, resulting in an abuse of the wide latitude granted

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2. Petitioner claims the Commission disregarded the stated criteria for this determination. However, this is incorrect. The criteria to which petitioner refers pertain to the granting of bail by the Commission after the preliminary interview, not to the summons/warrant question. The only standard for the latter question is that in the legislative history of section 4213(a), which seems to give the Commission complete discretion.

3. Although no probable cause was found to support some of the forty-five charges at the preliminary hearing, the propriety of proceeding by warrant must be judged from the facts as they appeared at the time of the decision, not in retrospect. Moreover, the eighteen violations for which probable cause was found at the preliminary interview would seem more than adequate to support a finding of frequency of violations.

the Parole Commission by the statute and regulations. Hence, there was no due process violation.

In light of the preliminary interview conducted by the Commission, petitioner's counsel has submitted an affidavit in which counsel alleges additional violations of due process. In view of all of the circumstances surrounding this case, the Court believes that the new allegations do not make out a due process claim. However, even if petitioner's new allegations raised a colorable due process claim, the present petition would have to be denied because petitioner has not alleged any "unusual circumstances" which mandate the exceptional measure of granting bail. The case law involving applications for bail pending habeas review indicates that "unusual circumstances" include those such as serious deterioration of the petitioner's health while incarcerated, short sentences so near completion that, without bail, collateral review would be ineffective, or possibly extraordinary delay in processing a habeas petition. *See Calley v. Callaway*, 496 F.2d 701, 702 n. 1 (5th Cir. 1974), and cases cited therein. Here, petitioner has made no showing of any circumstances of this nature.

For the foregoing reasons, the writ is denied and the petition dismissed. Inasmuch as the Court believes that this petition poses a question of law upon which the Court of Appeals should rule, the Court will issue a certificate of probable cause.

It is so ordered.

WEST KEY NUMBER SYSTEM

NATURAL GAS PIPELINE COMPANY OF AMERICA, Plaintiff,

v.

Albert William ZIMMER, John P. Zimmer, C. Willienell Zimmer Haynes, Alfred W. Brown, Alice E. Brown Jordan, George A. Brown, Lillian F. Brown Simpson, Albert L. Brown, Burdette O. Brown, Robert S. Brown, Cecil L. Brown and James C. Brown, Defendants,

v.

GULF OIL CORPORATION, Third-Party Defendant.

Civ. A. No. CA-2-76-9.

United States District Court, N. D. Texas, Amarillo Division.

Oct. 31, 1977.

Plaintiff sought declaratory judgment that oil and gas lease would remain in force [67] and effect so long as oil and gas is produced from tract under lease. The District Court, Woodward, Chief Judge, held that where habendum clause of oil and gas lease provided that it should not remain in force longer than 50 years from its date and a supplemental amending agreement provided that one well would constitute adequate development of tract but concluded "and said oil and gas lease shall remain

in full force and effect * * * said agreement was not intended to, and did not, amend the habendum clause of original lease so as to remove the 50-year term.

Judgment accordingly.

Judgment affirmed, 576 F.2d 106.

1. Mines and Minerals Key 73(2)

Under Texas law, an oil and gas lease will be strictly construed against the lessee, and if there is an irreconcilable conflict between the habendum clause of an instrument on one side and premises and recitals of that instrument on the other, the premises and recitals must yield.

2. Mines and Minerals Key 73.5

Where habendum clause of oil and gas lease provided that it should not remain in force longer than 50 years from its date and a supplemental amending agreement provided that one well would constitute adequate development of tract but concluded "and said oil and gas lease shall remain in full force and effect * * * so long as oil or gas is produced from any portion thereof," supplemental agreement was not intended to, and did not, amend the habendum clause of original lease so as to remove the 50-year term.

William H. Brian, Jr., Culton, Morgan, Britain & White, Howard F. Saunders, III, Amarillo, Tex., for plaintiff.

Harold W. Oschsner, Tabor Scott, Amarillo, Tex., Michael C. Smith, Charles C. Hairston, Edwin S. Hurst, Tulsa, Okl., for third-party defendant.

MEMORANDUM OPINION

WOODWARD, District Judge.

The above case was tried before the court without a jury on the 20th day of September, 1977 in Amarillo, Texas and same was submitted to the court on the basis of oral argument, stipulated facts, and written briefs from all counsel. After hearing and considering the arguments, pleadings, and briefs of the parties the court files this memorandum opinion which shall constitute the court's findings of fact and conclusions of law.

On January 16, 1926 William H. Brown and wife, Mary F. Brown, as lessors, did execute an oil and gas lease in favor of Gulf Production Company covering 1,280 acres, more or less, in Moore County, Texas. The defendants in this case are successors in interest to all rights created in the original lessors by said lease and plaintiff, Natural Gas Pipeline Company of America, is the owner of all gas rights under the leasehold estate. Gulf Oil Corporation is owner of a portion of the oil rights under the lease, with plaintiff owning the remaining oil rights.

The first sentence of the habendum clause of the lease [1] in question provides for an original term of 12 years and the

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1. **"Par. 2. TO HAVE AND TO HOLD unto said Lessee and to Lessee's successors and assigns for the term of Twelve (12) years from the date hereof and as much longer thereafter as oil or gas (or other minerals, if produced hereunder) are produced from said land. Provided, that this lease shall not remain in force longer than fifty (50) years from this date, and provided further, that a temporary cessation of production due to cleaning out, working over or drilling deeper of any well, or similar causes occurring after production secured, shall not terminate this lease. And Lessor covenants that Lessor has good title to said land and will protect Lessee in the quiet and peaceable possession thereof."**

second sentence contains a proviso that the lease shall not remain in force longer than 50 years. Delay rentals are provided for in Section 1, Paragraph 3 of the lease to be paid commencing twelve months after the date of the lease and continuing semiannually for eighteen six-months' periods in the absence of drilling operations by lessee. [68] Section 1, Paragraph 6 provides that the lease would wholly terminate if operations were not begun on or before ten years from the date of the lease. However, if lessee had begun operations prior to the termination of the ten year period, and was engaged in such operations at the end of said period, then lessee had the right to continue such operations and to make additional attempts to find oil or gas beyond the ten year period, provided such attempts were successive in the sense that no more than 60 days could elapse between the abandonment of work on one well and the beginning of operations on another. In no event could lessee continue operations to find oil and gas beyond the original term of twelve years in the absence of production.

The practical effect of these clauses was to grant the lessee a 10-year primary term, provided semiannual delay rentals were paid in the absence of oil and gas production, and to give lessee the privilege of carrying out further drilling operations for an additional two-year period if no oil and gas had been discovered at the end of the 10-year term but drilling operations were underway at the end of that time. Production during these periods would keep the lease in force and effect "as much longer thereafter" as oil and gas were produced from the land under lease, limited, however, to a fixed term of fifty years.

On April 5, 1935, the Browns entered into a supplemental agreement with plaintiff's predecessors in interest under the lease, Texhoma Natural Gas Company, who had acquired the gas rights of the original lessee, Gulf Production Company. Section II, Paragraph 1 of this agreement provided that if a well

had not been commenced on the tract under lease by January 15, 1936, the end of the 10-year primary term, lessee could pay on or before that date the sum of $1,280.00 and thereby extend its right to commence a well on said tract for an additional one year period. Paragraph 1 of Section II of the agreement also contained the following:

> ". . . it being the intention of the first party (the lessors) by this instrument to grant an extension of one year in which a well may be commenced if the sum of $1,280.00 be paid not later than January 15th, 1936."

This supplemental agreement contains a total of twelve paragraphs each of which amend the lease in some respect; however, some of these amendments are entirely unrelated to the intention of the lessor quoted above, that being to grant lessee an extension of one year in which to commence a well; rather, this agreement also contains provisions pertaining to proration of acreage to production, offset wells, development and royalties, among others. It is one such provision, found in Paragraph 4, Section II of this agreement which gives rise to the present controversy.

In Paragraph 4, of Section II [2] of the supplemental instrument the parties agreed that one well would constitute adequate development of the entire 1,280 acres under lease insofar as the production of natural gas was concerned. That paragraph further provides that "said oil and gas lease shall remain in full

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2. "4. One well shall constitute adequate development of said 1280 acres, in so far as the production of natural gas only is concerned, and said oil and gas lease shall remain in full force and effect as to all the land included within said 1280 acres, so long as oil or gas is produced from any portion thereof."

force and effect as to all the land included within said 1,280 acres, so long as oil or gas is produced from any portion thereof."

The plaintiff in this case contends that by virtue of the above quoted portion of Paragraph 4, the oil and gas lease is to remain in full force and effect so long as oil or gas is produced from said land and that this amendment did in effect remove from the original lease the proviso and limitation that the lease would not remain in force longer than fifty years from its date. Gulf, the owner of a portion of the oil rights under the lease, agrees with this contention.

The defendants, land owners, take the position that Paragraph 4, of Section II of the supplemental agreement did not have [69] the legal effect of amending the habendum clause of the original lease, so as to remove the fifty year limitation contained therein.

Plaintiff seeks a declaratory judgment that the lease will remain in force and effect so long as oil and gas is produced from the tract under lease and the pretrial order in this case and the stipulations contained therein show that there is an actual controversy between the parties over these instruments that requires court determination under the Declaratory Judgment Act. *Maryland Casualty Company v. Pacific Coal & Oil Company*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

In oral argument of the case all parties took the position that neither the lease nor the amending agreement were ambiguous. Both plaintiff and defendants contend that the intent of the original parties to the lease is set forth clearly and unambiguously on the face of the instruments in question, and that such intent supports their respective positions. This court agrees that the intent of the parties is clearly expressed in the instruments

under consideration and finds that only one reasonable interpretation can be attributed to the clauses in question; therefore, no ambiguity exists in the lease or in the supplemental agreement thereto. *Whelan v. Manziel*, 314 S.W.2d 126 (Tex.Civ. App.–Texarkana 1958, *writ ref.* n.r.e.).

When there is no ambiguity, only the question of the construction to be given the lease remains. *Pan American Petroleum Corporation v. Robinson*, 405 S.W.2d 698 (Tex.Civ.App.–Eastland 1966, *writ ref.* n.r.e.). This question of construction is properly a question of law for the court. *City of Pinehurst v. Spooner Addition Water Company*, 432 S.W.2d 515 (Tex. 1968). In construing a lease it is the duty of the court to seek the intention of the parties by considering all the provisions of the lease and by harmonizing, if possible, those provisions which appear to be in conflict, using the applicable rules of construction. *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341 (1957).

It is also a general rule of law in the case of unambiguous writings that the courts will give effect to the intention of the parties as expressed, or as is apparent in the writing, for it is the objective, not the subjective intent that controls. Therefore, when construing an unambiguous instrument it is not the real intent, but the intent expressed or apparent in the writing which is to be sought. *City of Pinehurst v. Spooner, supra.*

[1] Turning to the case at hand, this court must determine by construing both instruments as a whole whether the parties' predecessors in interest under the lease expressed an intent in Section II, Paragraph 4 of the amending agreement, [3] to modify the habendum clause of the original lease so as to remove

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3. *See* footnote 2, *supra*.

therefrom the 50-year limitation on the term of said lease. In making this determination the court must bear in mind that in Texas an oil and gas lease will be strictly construed against the lessee, ***Stephenson et al. v. Stitz et ux.***, 255 S.W. 812 (Tex.Civ. App.–San Antonio 1923, *err. ref.*), ***Leonard v. Caruthers***, 236 S.W. 189 (Tex.Civ.App.–Austin 1921), ***modified***, 254 S.W. 779 (Tex.Com.App.–1923, judgmt adopted), and that if there is an irreconcilable conflict between the habendum clause of an instrument on one side and premises and recitals of that instrument on the other, the premises and recitals must yield. ***Kokernot v. Caldwell***, 231 S.W.2d 528 (Tex.Civ.App.–Dallas 1950, *writ ref.*).

The court is aided somewhat in its inquiry by two decisions from the Texas courts interpreting the same lease form that is now under consideration. ***Gulf Oil Corporation et al. v. Southland Royalty Company et al.***, 478 S.W.2d 583 (Tex.Civ.App.–El Paso 1972), ***affirmed***, 496 S.W.2d 547 (Tex.1973). The ***Southland*** case involved an apparent conflict between the habendum clause of the lease with its 50-year limitation and a subsequent clause in the lease which provided in substance that when operations were delayed or interrupted due to forces beyond the control of the [70] lessee, such delay would not be counted against the lessee–anything in the lease to the contrary notwithstanding. The Railroad Commission of Texas, exercising its authority to control production of oil and gas within the state, prorated the production allowables of lessees' wells thereby decreasing daily production from said wells. Lessees contended that because their operations had been delayed by forces beyond their control, that is the Railroad Commission orders, the lease was extended beyond the fixed 50-year term, by the number of production days lost as a result of those orders.

Both the Court of Civil Appeals and the Supreme Court held that the subsequent clause in the ***Southland*** lease did not in any way alter, change or amend the fixed 50-year term found in the habendum clause of that lease. The Court of Civil Appeals was of the opinion that the greater weight of authority in construing oil and gas leases ascribes to the habendum or term clause, the dominant role in determining the length term of the lease, unless it is properly modified by other provisions. 478 S.W.2d 583 at 587. Finding that the parties to the ***Southland*** lease contemplated a definite and fixed term, the Court of Civil Appeals concluded that the subsequent clause did not properly modify the habendum clause. The Supreme Court of Texas, in construing the ***Southland*** lease said as follows: "In looking to the place in this lease where we would expect to find the term stated, we find this very certain language: 'Provided that this lease shall not remain in force longer than fifty (50) years from this date . . .' " With a plain and certain answer to the question of when the lease terminates, we cannot change that answer with words elsewhere in the lease not certainly directed to the same question. (Citations omitted.) 496 S.W.2d 547 at 552. Thus, both the Supreme Court and the Court of Civil Appeals held that the ***Southland*** lease terminated by its own 50-year limitation.

The ***Southland*** cases are, of course, factually distinguishable from the case at hand, in that, the ***Southland*** cases were concerned with a subsequent clause in the same lease, whereas in the case now before it, this court must determine whether a clause contained in a supplemental agreement properly modifies the habendum clause of the original lease. However, the ***Southland*** cases are controlling on the guidelines to be used by a court in determining the question presented here. Among other things the Supreme Court of Texas in those cases reaffirmed the principle that in construing oil and gas leases the habendum clause traditionally controls unless properly modified by other

provisions, and the fixed term therein stated is not to be extended by words found elsewhere in the lease not certainly directed to the modification of the habendum clause. *Gulf Oil Corporation et al. v. Southland Royalty Company*, 496 S.W.2d 547, at 552 (Tex.1973).

[2] Applying this principle, the court is of the opinion that Section II, Paragraph 4 of the supplemental agreement was not intended to, nor did it, amend the habendum clause of the original lease, so as to remove the 50-year limitation and to substitute therefor a provision that the lease would continue in force and effect so long as oil and gas were produced from the land under lease.

Section II, Paragraph 4 of the 1935 agreement deals with the development of the tract under lease. It provides that one well will constitute adequate development of the tract, insofar as natural gas is concerned and concludes, "and said oil and gas lease shall remain in full force and effect . . . so long as oil or gas is produced from any portion thereof." It should be noted that the phrase "so long as oil or gas is produced from any portion thereof" is not a new term added to the original parties' agreement by the 1935 amendment. Similar language is found in the first sentence of the habendum clause of the original lease wherein the grant of the leasehold estate is for a term of twelve years "and as much longer thereafter as oil or gas . . . are produced from said land." This language is followed by the second sentence of the habendum clause which provides that [71] the lease shall not remain in force longer than 50 years from its date. Thus, as used in the habendum clause of the original lease, the "as much longer thereafter" clause can only mean that if at the termination of the original twelve year grant, oil or gas was being produced, the lease would remain in effect so long as production continued, provided however, that in no event would the lease term be longer than 50 years. Plaintiff

does not, and indeed could not, contend that the 50 year fixed term was extended by the "as much longer thereafter" language found in the original lease, but now urges that similar language found in a development provision of a subsequent agreement between the original parties, evidences an intent by those parties to do away with the second sentence of the habendum clause which provides for a 50-year fixed term leasehold estate. This court does not agree.

Not in Section II, Paragraph 4 of the 1935 agreement, nor elsewhere in that instrument, is any mention made of the second sentence of the habendum clause, or of the fact that the 50-year fixed term was to be modified in any way. It is this court's opinion that Section II, Paragraph 4 of the supplemental agreement expressed an intention on the part of the parties to amend the original lease solely to the extent that only one well would be required to constitute adequate development of the tract insofar as natural gas was concerned. The language "and said oil and gas lease shall remain in full force and effect . . . so long as oil or gas is produced . . ." was added to this development clause solely to insure that if one well, which would constitute adequate development, was producing at the end of the extended exploration term created by the supplemental agreement, such well would keep the lease in full force and effect so long as gas was produced therefrom, or if further development resulted from the extended exploration period so long as oil or gas was produced from any portion of the tract. Such an intention coincides with the intent expressed by the parties in the first sentence of the habendum clause of the lease wherein the parties used "and as much longer thereafter" to insure the continuance of the leasehold estate past the twelve year original grant, if oil or gas was being produced. The parties intended, in both the original lease and the supplemental agreement, for the lease to remain in full force and effect beyond the 12-year original grant so long as oil or gas was being

produced, but they also intended for the lease to have an absolute fixed term of 50 years as evidenced by the inclusion of the second sentence in the habendum clause. This second sentence of the habendum clause is not modified in any way, not deleted from the original lease, nor is any inference made anywhere to it in the supplemental agreement.

The only reasonable intention that can be attributed to the parties, by construing the two instruments as a whole, is that nothing was contained in the 1935 agreement to change the 50-year fixed term of the original lease and no such intention can be inferred from any of the amendments that were made by that agreement.

This construction harmonizes two seemingly conflicting provisions of the original parties' agreement and is fully supported by the stated intention of the lessor found in Section II, Paragraph 1 of the supplemental agreement, wherein the first party's expressed intention by entering into said agreement was to create an extension of one year in which a well could be commenced. Admittedly, this expressed intention on the part of the original lessor is not consistent with many other amendments of the leasehold effected by the 1935 agreement, but certainly with the expressed intention and with the fact that no new language is introduced by said agreement concerning the 50-year fixed term, it would be an unreasonable stretching of the language used, to give the amendment any interpretation that would modify the 50-year term. This is especially so, in light of the Texas Supreme Court's mandate that clear language establishing a fixed term leasehold found within a habendum clause of a lease is not to be changed by words found elsewhere in the lease not certainly directed to [72] the same question. *Gulf Oil Corporation v. Southland Royalty Company*, 496 S.W.2d 547, at 552 (Tex.1973). Such reasoning is clearly applicable to the lease amendment before the court. Therefore,

the attorneys for the defendants will prepare and submit to the court a judgment finding and declaring that the lease terminated at the end of its 50-year term, January 16, 1976.

The judgment will be entered accordingly.

WEST KEY NUMBER SYSTEM

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, ASSOCIATED MARITIME OFFICERS, AFL-CIO, Plaintiff,

v.

Brock ADAMS et al., Defendants.

No. C 77-370.

United States District Court,
N. D. Ohio, W. D.

Nov. 18, 1977.

Labor organization representing marine engineers brought suit against vessel owner and the United States seeking to compel enforcement of statute requiring three watches aboard merchant vessels of the United States. On motions to dismiss and for preliminary injunction, the District Court, Walinski, J., held that: (1) labor organization had standing to maintain the action; (2) court had subject matter jurisdiction of claim for

mandamus relief against the government; (3) plaintiff failed to satisfy amount in controversy requirement with respect to private defendant in absence of any attempt in its pleadings to demonstrate that the value in money of the right which it sought to protect could be calculated or ascertained to exceed $10,000; (4) Coast Guard had no authority to nullify statutory three-watch requirement; (5) Coast Guard had ministerial duty to protect the health and welfare of plaintiff's members by invoking the penalty provisions of such statute, and (6) fact that plaintiff's members could leave the vessels and sue for their wages did not provide another adequate remedy at law so as to preclude mandamus relief.

Motions to dismiss denied in part and granted in part; preliminary injunction granted.

1. Mandamus Key 23(1)

Since statute requiring three watches aboard merchant vessels of United States was enacted for the protection of seamen, licensed engineers on whose behalf mandamus action to compel enforcement of the statute was brought by labor organization had suffered "threatened injury" from defendant government's alleged failure to enforce the statute, and thus plaintiff union had standing to maintain the action. 46 U.S.C.A. §§ 673, 689.

2. Federal Courts Key 11

To invoke jurisdiction under mandamus jurisdictional statute, plaintiff must allege that federal defendants are officers or agencies of the United States who owe him the performance of a clear, ministerial and nondiscretionary duty, but sufficient showing of statutory duty to permit jurisdiction is not determinative of the merits of the claim. 28 U.S.C.A. § 1361.

3. Federal Courts Key 11

Mandamus jurisdictional statute does not provide a basis for subject matter jurisdiction against private persons. 28 U.S.C.A. § 1361.

4. Federal Courts Key 343

Where plaintiff seeks injunctive relief, the amount in controversy is determined by the value to plaintiff of the right he seeks to protect. 28 U.S.C.A. § 1331(a).

5. Federal Courts Key 356

Where plaintiff's pleadings, in action seeking injunctive relief, made no attempt

* * *

APPENDIX B

1

James L. COODY, Petitioner-Appellant,

v.

**UNITED STATES of America,
Respondent-Appellee.**

No. 77-2096.

United States Court of Appeals,
Fifth Circuit.

June 19, 1978.

Appeal from the United States District Court for the Eastern District of Louisiana; Fred J. Cassibry, Judge.

James L. Coody, pro se.

John P. Volz, U. S. Atty., Mary Williams Cazalas, Asst. U. S. Atty., New Orleans, La., for respondent-appellee.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case, 570 F.2d 540, reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

3

**NATURAL GAS PIPELINE COMPANY
OF AMERICA, Plaintiff-Appellant,**

v.

**Albert William ZIMMER, Trustee of the
Estate of William H. Brown, Deceased,
Defendant and Third-Party Plaintiff-
Appellee,**

v.

**GULF OIL CORPORATION, Third-Party
Defendant-Appellant.**

**No. 78-1124
Summary Calendar.***

United States Court of Appeals,
Fifth Circuit.

July 5, 1978.

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* **Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.**

[106] [106]

Appeal from the United States District Court for the Northern District of Texas; Woodward, Chief Judge.

Howard F. Saunders III, William H. Brian Jr., Amarillo, Tex., for plaintiff-appellant.

Ochsner, & Baughman, Harold W. Ochsner, Tabor Scott, Amarillo, Tex., for defendant and third-party plaintiff-appellee.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

This case raises a question concerning the expiration date of an oil and gas lease. We affirm the decision of the district court that the lease in question terminated at the end of a fixed term of 50 years, on January 16, 1976, for the reasons set forth in the Memorandum Opinion of Judge Halbert O. Woodward. 447 F.Supp. 66 (N.D.Tex.1977).

AFFIRMED.

APPENDIX C

11246
OIL AND GAS LEASE

THE STATE OF TEXAS, 11246-G
COUNTY OF MOORE

SECTION 1.

PARAGRAPH 1. KNOW ALL MEN BY THESE PRESENTS:

THAT We, W. H. Brown and wife, Mary F. Brown, of the Post Office of Dumas of the County of Moore, State of Texas, hereinafter called Lessor (whether one or more), have and by these presents do hereby lease, demise and let unto Gulf Production Company, hereinafter styled Lessee, the tract of land hereinafter described, with the exclusive right of exploiting the same for and producing oil and gas therefrom, and to that end also grant the exclusive right of drilling and operating thereon for oil and gas, together with rights of way for telephone and telegraph lines and right to lay pipe lines and operate the same for the purpose of conveying water, oil, steam and gas, to erect, maintain and use storage tanks, sheds and buildings for the purpose of storing and caring for the minerals which may be produced, and the right to have and use sufficient water, oil, gas, wood and coal from the premises, free of cost, to operate and drill any wells that Lessee may bore or in the treating, so as to make merchantable, such minerals, and also such other privileges as are reasonably requisite for the conduct of said operations; and the right to remove, replace and substitute material and machinery, to draw and remove casing from abortive and abandoned wells, and at the termination of this lease to remove all property placed thereon by Lessee.

The said land is situated in Moore County, State of Texas, and described as follows:

Being all of Surveys Nos. Three (3) and Four (4) in Block M-1 of the lands originally granted to W. E. Bennett and containing Twelve Hundred Eighty acres (1280), more or less

It is agreed that for the purpose of calculating rentals, both before and after partial surrender, as hereinafter provided, the leased land contains One Thousand Two Hundred Eighty (-1,280-) acres; nevertheless, all of the above described land is embraced in this lease, be it more or less.

PAR. 2. TO HAVE AND TO HOLD unto said Lessee and to Lessee's successors and assigns for the term of Twelve (12) years from the date hereof and as much longer thereafter as oil or gas (or other minerals, if produced hereunder) are produced from said land. Provided, that this lease shall not remain in force longer than fifty (50) years from this date, and provided further, that a temporary cessation of production due to cleaning out, working over or drilling deeper of any well, or similar causes occuring after production secured, shall not terminate this lease. And Lessor covenants that Lessor has good title to said land and will protect Lessee in the quiet and peaceable possession thereof.

PAR. 3. Lessee agrees to begin operations for the drilling of a well on the premises within twelve (12) months from the date hereof, or, failing so to do, Lessee agrees to pay in the manner below stated for each six (6) months' period for which such drilling is delayed, not to exceed eighteen (18) such periods, the sum of Six Hundred Forty —No/100 - ($640.00) Dollars, such payment to be made on or before the beginning of each such period and shall be made by paying the same to the Lessor in person or to the National Bank of Commerce of Amarillo, Texas, or Lessee may mail Lessee's check to Lessor in said sum in care of said Bank, payable to Lessor, said Bank being hereby constituted Lessor's agent to receive said funds for Lessor or to receive and deliver said check to said Lessor, as the case may be;

in either of the three methods of making such payment Lessee may use Lessee's check and the mailing of said check shall be deemed making payment: if Lessee shall fail to make such payment in advance as above provided, and such failure or default shall continue for thiry (30) days after the due date of such payment, Lessor shall have the right to forfeit this lease.

PAR. 4. In the case of change of ownership of the land herein leased, or some part thereof, whether by descent and partition, devise, conveyance or otherwise, the above designated Bank shall become the Trustee for all the owners to receive and distribute the rentals among them, and the payment of the rentals to such Bank shall prevent forfeiture of this lease. In all cases where the original depository Bank shall refuse to receive payment of rentals, or should go out of business, or consolidate with another Bank, the Lessor, or successors in interest, shall have the right to designate in writing some Bank as Trustee, and until such designation is made and Lessee notified in writing such rentals shall not be due and no forfeiture of this lease can be declared if such rental is paid within thirty (30) days after receipt of such notice by Lessee.

PAR. 5. If while this lease is in force as herein provided, Lessee shall have begun operations in attempt to find oil or gas, then, without making any further payments Lessee may continue such attempt, and may make as many attempts as Lessee pleases; but if Lessee shall abandon such attempts for ninety (90) days without finding oil or gas in paying quantities, Lessee shall resume payment of the rentals falling due after the completion or abandonment of such well, at the next ensuing rental period beginning after such completion or abandonment; provided Lessee shall have at least ninety (90) days from the date of such abandonment of operations in which to make such payment and on resuming payment of rentals Lessee shall have the right to continue making the same or of beginning operations for the drilling of a well and to alternate such rights.

PAR. 6. If operations shall not be begun on or before the expiration of ten (10) years from this date, this lease shall wholly terminate, but if, prior to the termination of such ten (10) years, Lessee shall have begun operations in attempt to find oil or gas and is engaged in such operations at the end of the ten-year period, then Lessee shall have the right to continue such operations and also to make as many additional attempts to find oil or gas as Lessee desires beyond the expiration of said ten-year period; provided, however, that these attempts so extending such rights beyond such ten years must be successive in the sense that, until oil or gas be found in paying quantities, not more than sixty (60) days shall elapse between the abandonment of work on one well and the beginning of operations on another, and provided further that this right to make attempts before the discovery of oil or gas shall not continue in any event longer than twelve (12) years from the date hereof.

SECTION 2.

PARAGRAPH 1. If oil shall be found on said premises Lessee shall deliver as royalty to Lessor, free of expense, one-eighth (1/8) part of the oil saved from that produced, after deducting such part as may be used for drilling and operating on the land and treating the oil or gas so as to make it merchantable; such delivery to be made either into tanks supplied by Lessor with connections by Lessor provided, or into any pipe line that may be connected with the well; or Lessee may, at Lessee's option, buy such royalty oil, paying the current market price in the field at the time of production. If Lessee shall operate so as to save and utilize casinghead gas from said premises, then Lessee shall pay as royalty to Lessor one-eighth (1/8) part of the value of such gas, calculated at the rate of four (4) cents per one thousand (1,000) cubic feet of the casinghead gas, calculation as to quantity to be made on the basis of four (4) ounces pressure above atmospheric pressure at

the temperature of sixty (60) degrees Fahrenheit, as royalty on such casinghead gas, and such royalty accruing in each six months' period, beginning from the date hereof, to be paid within thirty (30) days after expiration of such period. If any well on said premises shall produce natural gas in paying quantities, and such natural gas is used off the premises or marketed by Lessee, then Lessor shall be paid at the rate of One-eighth of the proceeds from sale of such gas at the market price at the mouth of the well.

PAR. 2. If, as result of any explorations under this contract, any other minerals than oil or gas shall be found in quantities deemed by the Lessee to be paying, then Lessee shall have the optional right to mine for and produce the same, paying to the Lessor what, under all the circumstances, may be a reasonable royalty.

PAR. 3. All money royalties may be paid to Lessor as provided in Paragraph 3 of Section 1 hereof. Should the interest owned by Lessor in said land prove to be less than the whole, the royalties and rentals to be paid hereunder shall be paid to the Lessor in proportion only that Lessor's interest is to the entire interest or whole.

SECTION 3.

PARAGRAPH 1. It is agreed that, without the valid written consent of both parties hereto, no well shall be drilled, no shaft sunk, and no mining operations of any kind shall be carried on, within two hundred (200) feet of any dwelling houses now on said premises, and that the use of the surface of the land is hereby granted only so far as may be necessary or proper and convenient for the exercise of the rights herein granted.

SECTION 4.

PARAGRAPH 1. The obligation of Lessee with respect to drilling offset wells shall be to drill such offset wells as a prudent, responsible operator would drill under the same conditions if he owned the land hereby leased, subject to the following provisions, to-wit: When an offset well is demandable under the above provisions, the Lessee shall have the option of either drilling such offset well or of paying a royalty with respect thereto calculated as follows–take the well, as to which an offset is demanded, as a center; transcribe a circle around it with a radius of three hundred feet; ascertain what proportion of the area of such circle falls within this lease; such proportion shall be the proportion of royalty which shall be paid on the production of the well as to which an offset is demandable; thus, if that portion of the area of the circle included in this lease is one-fourth of the total area, then one-fourth of the royalty which would be payable on the well to be offset if the same was on this lease shall be paid; ***Provided***, that no well need be offset when there is a well practically or nearly between it and the line of this lease and such latter well has been offset, or royalty paid with respect thereto; ***Provided***, further, if the Lessee so elects, an offset well may be drilled at any time, even after royalties have been paid, and, from the beginning of such well, no royalty shall be paid with respect to the well to be offset. Such royalty shall be a money royalty determined by the market value of the oil when produced. This provision shall also apply to gas wells provided the gas is marketable at the time and place.

SECTION 5.

PARAGRAPH 1. Lessee further agrees to pay the actual cash value, at the time of destruction, of any growing crops destroyed or said leased premises by operations hereunder, or the reasonable damage to any such crops caused by such operations.

SECTION 6.

PARAGRAPH 1. Lessee may pay off any lien or taxes now or hereafter due on or against said land; and if Lessee does so, Lessee shall be subrogated to all the rights of the holder of such lien or tax debt, and shall have a lien on all rentals and royalties accruing hereunder for reimbursement.

SECTION 7.

PARAGRAPH 1. When drilling or other operations are delayed or interrupted by storm, flood, or other act of God, by fire, rebellion, scarcity of water, insurrection, riots, strikes, scarcity of labor, differences with employees, or failure of carriers to transport or furnish facilities for transportation, or as the result of some order, requisition or necessity of the Government or as the result of any cause whatsoever beyond the control of the Lessee, the time of such delay or interruption shall not be counted against the Lessee–anything in this lease to the contrary notwithstanding.

SECTION 8.

PARAGRAPH 1. Lessee is hereby given the right to surrender this lease at any time as to all or any part of the land hereby leased upon paying to the Lessor two cents (2 ¢) cents per acre for each acre surrendered in addition to any sums that may be then due and accrued under the terms hereof, in the manner provided in Paragraph 3 of Section 1 hereof, and upon making such surrender the Lessee shall thereupon be released from all further payments, liabilities, or obligations as respects the land surrendered, and the rentals provided for in Paragraph 3 of Section 1 hereof shall be reduced by the proportion of acreage surrendered to the whole.

SECTION 9.

PARAGRAPH 1. It is further agreed that all the conditions and terms herein shall extend to the heirs, executors, legal representatives, successors in interest and assigns, of the parties hereto; but no change of ownership of the land, or part thereof, shall impose any additional obligation or burden on the Lessee, and to that end Lessor here covenants for himself, his heirs, assigns and successors in interest, that in case of any change of ownership of said land, or part thereof, whether by convevance, will, inheritance, partition, or otherwise, all rentals and royalties accruing hereunder shall be paid to the new owners in proportion to their ownership of the whole of the land hereby leased so that no owner of a segregated part of said land shall be entitled to the whole royalties accruing from developments on said segregated tract, but only to such part of such royalty as the acreage in his tract is to the whole acreage embraced in this lease; this covenant shall be taken and construed as a covenant running with the land and binding on all successors in interest to Lessor herein. The Lessee shall not be held responsible for the payment of such rentals or royalties to such new owner unless and until the Lessee shall be furnished with the instrument of transfer, or a duly certified copy thereof, and in case of no transfer in writing, with legally sufficient evidence thereof, such evidence of transfer to be furnished at least thirty (30) days before such royalties or rentals become due. If, by change in ownership, more than ten (10) separate parties become entitled to royalty, Lessee may require, before paying royalty, that such parties so entitled designate, in a writing furnished to the Lessee, one of their number, or a Trustee, to receive the payment of the royalty for all of them.

SECTION 10.

PARAGRAPH 1. It is further agreed that in the event this Leasehold shall be assigned as to a part or as to parts of the

above described lands (and such right of assignment is hereby given), and the Lessee or assignee or assignees shall fail or make default in the payment of the proportionate part of the rentals due from him or them, such default shall not operate to defeat or affect this lease, in so far as it covers a part or parts of said land upon which the said Lessee, or any assignee of the Lessee, shall make due payment of his proportionate part of said rental; but operations begun on any part of the leased premises will keep this lease in force as to all the premises upon which all rentals falling due prior to the beginning of such operations have been paid.

PAR. 2. It is further agreed that in case of change of ownership of parts of the land, or of this leasehold, that the rentals shall be apportioned in accordance with the acreage each transferee or assignee becomes entitled to.

PAR. 3. It is further agreed that any rentals paid and received hereunder shall constitute a consideration, not only for delay in drilling the well but for securing the right to pay future rentals to keep the lease in full force and effect until drilling is commenced, and any such rentals so paid shall be deemed and considered as adequate consideration for all the rights hereby granted.

SECTION 11.

PARAGRAPH 1. Lessee has this day paid to Lessor the sum of Nine Thousand Six Hundred and No/100 —— ($9,600.00) DOLLARS, the receipt of which is hereby acknowledged, which payment is received in full payment and satisfaction and is deemed sufficient consideration for each and every right hereby granted. It is stipulated and agreed that this instrument embraces the entire contract between the parties, and that no promises or representations of any kind not embraced herein have been made to induce the execution of this contract.

IN TESTIMONY WHEREOF the parties hereto have duly executed this instrument, on this the 16th day of January, A.D. 1926, the parties hereto acting in person or by duly authorized agent.

WITNESSES:

_____

_____

/s/ Wm. H. Brown

/s/ Mary F. Brown

_____

_____

LESSOR.

GULF PRODUCTION COMPANY,

LESSEE.

By /s/ G. H. Pratt

AGENT.

ACKNOWLEDGMENTS

THE STATE OF TEXAS,
COUNTY OF POTTER

Before me the under-signed authority,

a Notary Public in and for the County of Potter and State of Texas, on this day personally appeared W. H. Brown known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 16th day of January, A.D. 1926.

/s/ (illegible) Notary Public,
in and for Potter County, Texas

THE STATE OF TEXAS,
COUNTY OF TARRANT

Before me, the under-signed authority,

a Notary Public in and for the County of Tarrant and State of Texas, on this day personally appeared G. H. Pratt known to me to be the person whose name is subscribed to the foregoing instrument as Agent of Gulf Production Company, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and as the act and deed of said Gulf Production Company.

Given under my hand and seal of office on this the 1st day of March, A.D. 1926.

/s/ M. A. McDonald Notary Public,
in and for Tarrant County, Texas

THE STATE OF TEXAS,
COUNTY OF POTTER

Before me, the undersigned authority,

a Notary Public in and for the County of Potter and State of Texas, on this day personally appeared Mary F. Brown wife of W. H. Brown known to me to be the person whose name is subscribed to the foregoing instrument and having been examined by me privil, and apart from her husband, and having the same fully explained to her, she, the said Mary F. Brown acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office on this the 16th day of January, A.D. 1926.

/s/ (illegible) Notary Public,
in and for Potter County, Texas

CERTIFICATE OF RECORD

The State of Texas, County of Moore.

I, W. W. DAUGHERTY, Clerk of the County Court in and for said County, do hereby certify that the foregoing Instrument dated the 16th day of January, A.D. 1926, together with its certificates of authentication, was filed for record in my office the 11th day of March A.D. 1926, at 9 o'clock A.M., and duly recorded on the 19th day of March, A.D. 1926, in The Deed Records of Moore County, in volume 28, on pages 346 to 350.

WITNESS MY HAND AND OFFICIAL SEAL, At my office in Dumas, Texas, the day and date last above written.

/s/ W. W. Daugherty
Clerk County Court, Moore County, Texas.

[L.S.] By _____, Deputy.

No. 11246

OIL AND GAS LEASE
TEXAS

Wm. H. Brown, et ux,

TO

GULF PRODUCTION CO.

Post Office address of Lessor Authorized to receive rent, is

Filed for Record this the 11th day of March A.D. 1926, at 9 o'clock A.M.

/s/ W. W. Daugherty
County Clerk.

By _____
Deputy.

Recorded _____, A.D. 192__
in _____ Record
of _____ Book _____
Page _____

_____
County Clerk.

By _____
Deputy.

Chg. GULF PRODUCTION CO.
P. O. DRAWER (illegible)
LAND DEPT.

11246-G

STATE OF TEXAS)
(
COUNTY OF MOORE)

THIS AGREEMENT, entered into between WM. H. BROWN, a widower, herein styled "first party", and TEXOMA NATURAL GAS COMPANY, a corporation, herein referred to as "Texoma", second party,

WITNESSETH:

I.

On January 16th, 1926, Wm. H. Brown and wife, Mary F. Brown, executed to Gulf Production Company an oil and gas lease covering all of Surveys 3 and 4, in Block M-1, Moore County, Texas, containing 1280 acres of land, more or less, which said lease is of record in Vol. 28, page 346, of the Deed Records of Moore County, Texas. Said oil and gas lease is now in full force and effect, and Texoma is the owner of all gas rights thereunder.

II.

The parties hereto desire to stipulate concerning the production of gas from said land, and concerning the drilling of a test well thereon. To this end, it is agreed between the parties hereto as follows:

1. Said lease, in the absence of commencing drilling operations on said land, will expire on January 15th, 1936. It is here agreed that if by that date a well has not been commenced on said land under said oil and gas lease, by either the owner of the gas rights, or the owner of the oil rights under said lease, the

lessee shall have the right, on or before January 15th, 1936, to deposit to the credit of first party, in the Amarillo National Bank of Amarillo, Texas, the sum of Twelve Hundred Eighty ($1280.00) Dollars for an extension of the right to commence a well on said land for the period of one year, commencing January 16th, 1936; and in the event of such payment, and if a well is commenced during said 12 month period, the rights of the owners of the oil lease and the gas lease shall be the same as if said original lease had authorized said well to be commenced prior to January 16th, 1937; it being the intention of first party by this instrument to grant an extension of one year in which a well may be commenced if the sum of $1280.00 be paid not later than January 15th, 1936.

2. In the event that a well is commenced on said land prior to January 16th, 1936, or if after payment of said sum of $1280.00, a well is commenced on said land prior to January 16th, 1937, and such well when completed produces gas in sufficient quantities and of a satisfactory quality for Texoma to use the same in its pipe line to its light, heat and fuel market, then Texoma agrees that in supplying its light, heat and fuel markets, it will allocate its withdrawals of gas, taking into consideration the amount of acreage comprising the leasehold and the open flow of the well or wells located thereon, and will consider as its total acreage only that acreage from which production of gas is being taken, either under an original lease, or under consolidations of original leases, and that it will allocate to the well or wells located on said 1280 acres a production on the basis of 1280 acres.

3. Texoma shall not be required to make any particular allocation to any particular well on said land in determining the amount of production it will take; but its allocation shall be to the 1280 acres as an entirety, and the production apportioned among the wells located thereon as to it may seem proper.

4. One well shall constitute adequate development of said 1280 acres, in so far as the production of natural gas only is concerned, and said oil and gas lease shall remain in full force and effect as to all the land included within said 1280 acres, so long as oil or gas is produced from any portion thereof.

5. There shall be no obligation on Texoma to drill offsets to any gas well which may be drilled on, or produce gas from neighboring lands, but Texoma may drill additional wells if, as, and when it so desires. However, the drilling of such additional wells shall not require Texoma, in allocating its gas withdrawals, to increase its takes from said 1280 acres, so long as it allocates to that acreage a production on the basis of potential open flow and the acreage underlying the leaseholds.

6. Texoma agrees to pay a royalty for the natural gas produced from said land under this contract, calculated at the rates and in the manner provided in gas royalty division order which is executed by first party to second party, of even date herewith, said division order being operative to December 31st, 1944, and thereafter the royalty shall be 1/8th the market value at the mouth of the well.

7. In the event as a result of drilling operations commenced prior to January 16th, 1937, a well shall be completed producing gas in sufficient quantities and of satisfactory quality for same to be used by Texoma in its markets for natural gas for light, heat and fuel purposes, Texoma will connect the well to its pipe line within a reasonable time from the completion of said well, not to exceed sixty (60) days therefrom.

8. In the event said well, when and if drilled, shall result in a producer of natural gas, but not in satisfactory quantities and of satisfactory quality for such gas to be used in Texoma's pipe line referred to; or if said well shall result in a producer of oil, the provisions of this contract relative to the amount of

production shall not be applicable except that the rights of the parties shall be governed by the provisions of the original lease and as if the well had been completed within the primary term provided for in said original lease.

9. Nothing herein contained shall be construed to waive any rights lessors may have at any time to require drilling of offset wells, or to require the additional development of said land for the purpose of oil production, and the provisions of said original lease shall remain in full force and effect, except as modified herein.

10. In the event Texoma shall hereafter surrender the gas rights under said lease to the holder of the oil rights thereunder, all provisions hereof as to the amount of gas taken and the adequacy of development as to natural gas, as well as the provisions of the division order shall cease to be effective.

11. Texoma shall at no time be required to take from any well or wells located on said land a greater production than it is permitted to take under valid laws or valid rules and regulations of the Railroad Commission of Texas, or any other regulatory body or officer.

12. The terms of this instrument shall inure to the benefit of the owners of the oil rights under said lease, in so far as its estate is preserved and continued in force, and this instrument shall be binding upon the parties hereto, their respective heirs, successors and assigns.

IN FAITH WHEREOF, the parties have caused this instrument to be executed, this the 5th day of April, A. D. 1935.

/s/ Wm. H. Brown
FIRST PARTY.

TEXOMA NATURAL GAS COMPANY,

By /s/ Floyd C. Brown

SEAL

ATTEST:

/s/ (illegible)
Secretary

SECOND PARTY.

STATE OF TEXAS)
(
COUNTY OF POTTER)

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared WM. H. BROWN, a widower, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 5th day of April, A. D. 1935.

SEAL

/s/ Lucile Martin
NOTARY PUBLIC POTTER COUNTY TEXAS.

STATE OF ILLINOIS)
(
COUNTY OF COOK)

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared FLOYD C. BROWN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of Texoma Natural Gas Company, a corporation, of Cook County, Illinois, and as Vice-President thereof, for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 16th day of April, A. D. 1935.

SEAL

/s/ (illegible)
NOTARY PUBLIC COOK COUNTY ILLINOIS.

MY COMMISSION EXPIRES JULY 21, 1935

The State of Texas, County of Moore.

I, EZELLE FOX, Clerk of the County Court in and for said County, do hereby certify that the foregoing INSTRUMENT, together with its certificates of authentication, was filed for record in my office the 20th day of April, A. D. 1935, at 1 o'clock P.M. and duly recorded on the 20th day of April, A. D. 1935, in the Deed Records of Moore County, in volume 53, on pages 265-67.

WITNESS MY HAND AND OFFICIAL SEAL, At my office in Dumas, Texas, the day and date last above written.

SEAL

/s/ Ezelle Fox

Clerk County Court, Moore County, Texas.

By _____ Deputy.

WM. H. BROWN and wife,
MARY F. BROWN,

AND

TEXOMA NATURAL GAS COMPANY.

STIPULATION.

Filed for Record this the 20th day of April A.D., 1935 at 1 o'clock P.M.

/s/ Ezelle Fox County Clerk

By _____ Deputy

MORGAN, CULTON, MORGAN & BRITAIN
ATTORNEYS AT LAW
AMARILLO, TEXAS

SCOFIELD PRINTING CO., INC.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-554

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

v.

ALBERT WILLIAM ZIMMER, JOHN P. ZIMMER, C. WILLIENELL ZIMMER HAYNES, ALFRED W. BROWN, ALICE E. BROWN JORDAN, GEORGE A. BROWN, LILLIAN F. BROWN SIMPSON, ALBERT L. BROWN, BURDETTE O. BROWN, ROBERT S. BROWN, CECIL L. BROWN AND JAMES C. BROWN,
Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, reported at 477 F. Supp. (1977), appears at Appendix A, pp. A-1 - A-17 for Petitioner's Petition. The opinion of the United States Court of Appeals, Fifth Circuit, 576 F. 2d 106 (1978) appears at Appendix B, pp. A-18 - A-20 for Petioner's Petition. The Court of Appeals affirmed the Judgment of the District Court, for the reasons set forth in the Memorandum Opinion of the District Court, cited above. On August 24, 1978, the Court of Appeals denied a petition for rehearing.

JURISDICTION

The asserted jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The question presented as set forth in the petition is based on the erroneous assumption that the United States Court of Appeals, Fifth Circuit by affirming the Judgment of the District Court of the Northern District of Texas, decided the question presented in a conflict with applicable state law.

STATEMENT OF THE CASE

The "Statement of Facts" set forth in the petition (Pet. 3-4) is correct for the most part but omits certain facts which Respondents consider essential for a complete understanding of the case.

Respondents would point out to the Court that the original lease was for an original term of twelve (12) years from date of the lease;

> "and as much longer thereafter as oil or gas (or other minerals if produced here under) are produced on said land. Provided, that this lease shall not remain in force longer than fifty (50) years from this date." (Pet. App. C, A-22)

The amending agreement (Pet. App. C, A-34) described by Petitioner made no mention of, or no effort to change the fifty year life term of the original lease and paragraph one of section two of the amending agreement (Pet. App. C, A-34) contained the following:

> "It being the intention of the first party (the Lessor) by this instrument to grant an extension of one year in which a well may be commenced if the sum of $1280 be paid not later than January 15, 1936."

Other changes were made in the lease all of which dealt primarily with development and lease operations.

The Respondent represents to this court that the decision of the question presented will affect only the parties to this suit. When the construction of an oil and gas lease containing the same language or language with the same import is involved and presented to a court for construction the law is well settled by prior Texas decisions. The statement of Petitioner that the decision of the question presented will affect other persons who are parties to oil and gas leases containing the same language or language with the same import may or may not be true because Petitioner's statement assumes a similar situation with an amending agreement and there is no evidence of such similar leases with similar amending agreements being in existence.

REASON FOR DENYING THE WRIT

The question before the Trial Court was whether the amending agreement had eliminated the fifty (50) year term of the original lease, and modified the habendum clause.

Petitioner cites Maddox Motor Co. vs. Ford Motor Co., 23 S.W.(2) 333 Tex. Comm. App. 1930 (holding approved) as controlling on the question before the court. The Maddox case is not applicable. In the Maddox case (supra) the court had a written contract between Ford Motor Co. and an automobile dealership which had been modified by an oral agreement. This is clearly a different fact situation and the parties in the

Maddox case (supra) were not attempting to modify the habendum clause of an oil and gas lease.

Petitioner for the first time maintains that the lease and the amending agreement are ambiguous (Pet. 5), however in the trial court it was stipulated by counsel for all parties that the two instruments were not ambiguous as found by the Trial Court in its memorandum opinion. (Pet. App. A-8)

In order to modify the habendum clause of an oil and gas lease, any subsequent amending agreement must speak directly to the habendum clause. Gulf Oil Corp. vs. Southland Royalty Co. et al., 478 S.W.(2) 583 (Tex. Civ. App. 1972 El Paso), Affirmed 496 S.W. (2) 547 (Tex. Sup. CT. 1973) Kokernot vs. Caldwell, 231 S.W.(2) 528 Tex. Civ. App. Dallas, 1950 Writ Ref.

The Trial Court in its opinion (Pet. App. A-11) stated that the Southland cases (supra) were factually distinguishable because in the Southland cases the courts were concerned with a subsequent clause in the original lease, but that the Southland cases are controlling on the guidelines to be applied by a court in deciding the question of whether or not the habendum clause in a lease had been modified. The Southland cases (supra) restated and affirmed the principle that the habendum clause is controlling unless properly modified by subsequent words specifically directed to the habendum clause.

The paragraph in the amending agreement Sec. II, Paragraph 4 (Pet. App. C, A-36) which Petitioner contends modified the habendum clause of the original lease merely provided that the lessee could hold the lease by one well on both sections and dealt with development of the lease and does not refer specifically to the fifty (50) year life term of the lease.

Petitioner states that the amending agreement contained all the provisions necessary to constitute a separate oil and gas lease (Pet. 5). Respondent says that the amending agreement to constitute a lease by itself must have words of conveyance, warranty and must grant an estate. The amending agreement does not contain any words of conveyance, warranty, or grant an Estate and therefore cannot stand as a lease by itself.

The amending agreement was nothing more than an extension of the primary term and an agreement as to lease development as stated in the opening paragraph of Section II of the amending agreement (Pet. App. C, A-34) as follows:

> "The parties hereto desire to stipulate concerning the production of gas from said land, and concerning the drilling of a test well thereon. To this end, it is agreed between the parties hereto as follows . . . ."

Based on the foregoing, the decision in this case does not conflict with applicable state law, but in truth and fact applies the applicable law of State of Texas insofar as it deals with the construction of oil and gas leases.

CONCLUSION

For the foregoing reasons the Respondent respectfully submits to this court that the Writ of Certiorari to review the decision of the United States Court of Appeals, Fifth Circuit, should be denied.

Respectfully submitted,

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